

NOTICE: Summary decisions issued by the Appeals Court pursuant to its rule 1:28, as amended by 73 Mass. App. Ct. 1001 (2009), are primarily directed to the parties and, therefore, may not fully address the facts of the case or the panel's decisional rationale. Moreover, such decisions are not circulated to the entire court and, therefore, represent only the views of the panel that decided the case. A summary decision pursuant to rule 1:28 issued after February 25, 2008, may be cited for its persuasive value but, because of the limitations noted above, not as binding precedent. See Chace v. Curran, 71 Mass. App. Ct. 258, 260 n.4 (2008).

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

17-P-978

COMMONWEALTH

vs.

COREY D. BAILEY.

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

Following a jury trial, the defendant was convicted of a single count of trespassing. Prior to trial, the defendant moved to dismiss the complaint, arguing that the underlying police report contained insufficient facts to find probable cause to issue a complaint. The motion judge, who was also the trial judge, denied the motion. On appeal, the defendant challenges the denial of his motion. Because we agree that insufficient evidence supported the application for complaint, we reverse the judgment and order that the complaint against the defendant be dismissed.¹

¹ The defendant also raises claims that the Commonwealth presented insufficient evidence at trial, that certain evidence was improperly admitted, that the jury were improperly instructed, and that his attorney provided ineffective assistance. Concluding as we do that the defendant's motion to dismiss the complaint should have been allowed, we need not address these additional claims.

Discussion. "In reviewing a motion to dismiss a complaint, the judge must decide whether the complaint application contains 'sufficient evidence to establish the identity of the accused . . . and probable cause to arrest him.'" Commonwealth v. Humberto H., 466 Mass. 562, 565 (2013), quoting Commonwealth v. McCarthy, 385 Mass. 160, 163 (1982). An application for complaint "must include information to support probable cause as to each essential element of the offense." Humberto H., supra at 565-566. "To satisfy the probable cause standard, 'more than mere suspicion' is required, but the evidence need not be sufficient to warrant a conviction." Commonwealth v. Geordi G., 94 Mass. App. Ct. 82, 84-85 (2018), quoting Commonwealth v. Cartright, 478 Mass. 273, 283 (2017).

"Whether the complaint application establishes probable cause is a question of law" and, thus, we review the motion judge's decision de novo, "without deference to the motion judge's factual findings or legal conclusions." Commonwealth v. Brennan, 481 Mass. 146, 149 (2018), citing Humberto H., 466 Mass at 566. "Our review of the judge's order of dismissal is confined to the four corners of the application for complaint, which in this case is essentially the police incident report" Commonwealth v. Ilya I., 470 Mass. 625, 626 (2015). We review the evidence in the light most favorable to the

Commonwealth. See Commonwealth v. Levesque, 436 Mass. 443, 444 (2002).

A trespass is committed where a defendant enters or remains in a location without right after having been forbidden to do so. See Commonwealth v. Vinnicombe, 28 Mass. App. Ct. 934, 935 (1990). See also G. L. c. 266, § 120. The Commonwealth bears the burden to establish that a trespass is "without right." See Commonwealth v. Alvarez, 480 Mass. 1017, 1019 (2018). "Without right" signifies "the absence of any right, permission, or license recognized by law as permitting an entry into an area" Commonwealth v. Wolf, 34 Mass. App. Ct. 949, 951 (1993). Here, the defendant argues that the information presented in the application for complaint did not give rise to probable cause that the defendant entered or remained on Boston College property without right. We agree.

The Commonwealth presented detailed testimony at trial that prior to the date of the offense, the defendant previously had been issued by the campus police a trespass warning for Boston College property, but this fact was omitted from the incident report appended to the application for complaint. Instead, the report at issue stated only that the officer "recognized" the defendant, referring to another incident report by number "for

specific details."² Because the referenced report was not appended to the application for complaint, and was not otherwise before the clerk magistrate, it cannot support a determination of probable cause. Compare Commonwealth v. Forish, 61 Mass. App. Ct. 554, 560 (2004) ("perfunctory statement" in search warrant purporting to incorporate an unattached affidavit by reference did not cause search warrant to incorporate the affidavit).

The Commonwealth argues that information provided by Officer Callahan on the face of the standard application for complaint form sufficed to prove that the defendant was present "without right." Specifically, it relies on an area entitled "Variables," which has been completed as follows: "Corey Biley [sic] did without right enter or remain in or upon Boston College Property after being forbidden to do so." Both this language and the context of the form strongly suggest that such a statement is intended to describe the charge, not to provide evidence in support of it.³ Even were this not so, however, a

² Though there is no court document in the appellate record which conclusively identifies the attachments to the application for complaint, the defendant represents that the prior incident report at issue was not attached to the application. As the Commonwealth does not contest this representation and it is supported by the motion hearing transcript, we adopt it.

³ We note, for example, that, at the bottom of the form, the magistrate checked a box indicating that the complaint was

single vague and conclusory statement cannot constitute "reasonably trustworthy information sufficient to warrant a reasonable or prudent person in believing that the defendant has committed the offense." Commonwealth v. Brennan, 481 Mass. 146, 149 (2018).

The incident report offered in support of the application for complaint, in sum, reflects that in the early afternoon, the defendant, who was recognized by a Boston College police officer, pulled his scooter into a Boston College parking lot. He was wearing a delivery service identification card, and was permitted to deliver food to a female student prior to his arrest. In the absence of any indication that the defendant had been forbidden to enter the campus or that the parking lot prohibited deliveries or delivery vehicles, the application for complaint failed to give rise to probable cause that the defendant was on the premises "without right."

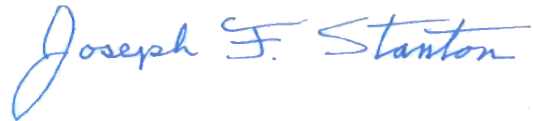
Where the defendant's motion to dismiss for want of probable cause to support the charging document should have been granted, the defendant is entitled to reversal of any subsequent conviction. See Commonwealth v. Tam, 49 Mass. App. Ct. 31, 41 (2000). Accordingly, the judgment of the District Court is

issued solely based on "facts set forth in attached statement(s)" (emphasis added).

reversed, the verdict is set aside, and the complaint shall be dismissed.

So ordered.

By the Court (Maldonado,
Neyman & Ditkoff, JJ.⁴),

A handwritten signature in blue ink that reads "Joseph F. Stanton". The signature is written in a cursive, flowing style.

Clerk

Entered: July 25, 2019.

⁴ The panelists are listed in order of seniority.